

Chapter 4

The Legal Framework for Water Management

The Fundamentals of Water Rights

Article IX Section 3(1) of the Montana Constitution provides, “All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.” Thus while ownership of water remains with the state, Montanans can acquire a water right pursuant to state law which authorizes them to appropriate water to put it to use. The legal framework for water rights is referred to as the prior appropriation doctrine, which includes two general rules expressed by the following easy-to-remember axioms: “first in time, first in right” and “use it or lose it.”

“First in time, first in right” relates to the priority date of a water right. The priority date refers to the date on which the water was first put to beneficial use. The earlier the priority date, the better the water right. A senior water right holder with an earlier priority date is entitled to use the full amount of his or her water right before any junior water right holder can use any water. In times of shortage, the senior water right can take all of the available water.

“Use it or lose it” refers to the requirement to use water beneficially. For example, if someone has the right to divert water for irrigation but is haying and does not currently need the water for beneficial use, he or she cannot continue to divert the water but must leave it in the stream for use by junior water rights holders. When water is no longer put to a beneficial use, the right to use it can be lost or abandoned. Ten years of non-use is the statutory trigger required for the issue of abandonment of a water right to arise in an administrative review. Beneficial use is the “basis, measure, and limit” of a water right. In other words, if someone claims a water right for 10 cubic feet per second (cfs) but has historically used only 7 cfs, that person’s water right is only for the 7 cfs put to beneficial use.

While the basic rules of Montana water law are fairly simple, their actual application often becomes complicated. This section does not attempt to explain all of the nuances of Montana water law. A few selected topics with particular application to the Clark Fork River Basin are described below.

The 1973 Water Use Act

Prior to 1973, a water right could be acquired in one of two ways: by putting water to a beneficial use or by posting a notice of intent to use water and filing the notice with the county clerk. No written record existed for rights acquired the first way, the so-called use rights. Without written records, Montana struggled to develop a mechanism to administer the development of new water rights. In 1972 this issue was still not resolved, so the framers of 1972 Constitution included in Article IX Section 3 (4) a directive to the legislature to “...provide for the administration, control and regulation of water rights and...(to)...establish a system of centralized records....” In response, the 1973 Legislature passed the Montana Water Use Act. In addition to establishing a centralized record system for water rights, this Act:

- Required that all water rights existing prior to July 1, 1973, must be finalized through a statewide water rights adjudication in state courts;
- Established a permit system for obtaining water rights for new or additional water rights;
- Established criteria for the issuance of new water right permit; and

- Established an authorization system for changing water rights.

Since the passage of the 1973 Water Use Act, a person cannot receive a new right to use water without first applying for and receiving a water use permit from DNRC. Before DNRC can issue a water use permit, the applicant must prove, among other things, that unappropriated water is available for the new use and the new use will not adversely affect existing water rights.

Additional public interest criteria and in some cases legislative approval are required for appropriations of 4,000 or more acre-feet per year or 5.5 or more cubic feet per second. In 1993, the Legislature integrated water quality into the permit process. If a water quality issue is raised by an existing water right holder, the Montana Department of Environmental Quality, a local Water Quality District, or, in certain instances, the holder of a Montana Pollution Discharge Elimination System permit, the applicant must prove that water quality concerns do not exist or can be mitigated.

Basin Closure

A basin closure essentially predetermines these issues and declares that no water is legally available for new uses, and therefore precludes DNRC from issuing new water use permits. It does not, however, affect the ability to change existing water rights. Basin closures are designed to protect existing water right holders by prohibiting new junior water uses and by eliminating the need to spend time and money objecting to proposed new uses on streams which are already over appropriated.¹ Basin closures may be established through one of three mechanisms: a petition and hearing to close a basin by administrative rule, by legislative action, or as a result of negotiation of reserved water rights compacts. A basin closure also does not have to apply to all water uses. For example, the current basin closure in the upper Clark Fork basin does not apply to groundwater, water for domestic use, stock water, or water for storage for beneficial uses.

Fourteen areas in the Clark Fork have basin closures, the details of which vary. These closures include:

- The temporary Bitterroot basin closure passed by the legislature in 1999 (85-2-344, MCA).
- The permanent closure of the upper Clark Fork River basin, defined as the river and all tributaries including the Big Blackfoot River above Milltown Dam, passed by the Legislature in 1995 (see 85-2-335 through 85-2-337, MCA).
- The closure of Glacier National Park established pursuant to the compact with the National Park Service.
- The seven small administrative rule closures of:
 - Grant Creek, a tributary of the Clark Fork River;
 - Houle Creek, a tributary of the Clark Fork River;
 - Sixmile Creek, a tributary of the Clark Fork River;

¹ Section 85-2-319(2) MCA provides that a petition for a basin closure "...must allege facts showing that throughout or at certain times of the year or for certain beneficial uses:

- (a) there are no unappropriated waters in the source of supply;
 - (b) the rights of prior appropriators will be adversely affected;
 - (c) further uses will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; or
 - (d) in the case of a petition filed by the department of environmental quality:
 - (i) the water quality of an appropriator will be adversely affected by the issuance of permits;
 - (ii) further use will not be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); or
 - (iii) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will be adversely affected by the issuance of permits."
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- Sharrott Creek, a tributary of the Bitterroot River;
- Willow Creek, a tributary of the Bitterroot River;
- Walker Creek, a tributary of the Whitefish River; and
- Truman Creek, a tributary to Ashley Creek in the Flathead.
- The four small controlled groundwater areas of:
 - Hayes Creek watershed groundwater area near Missoula;
 - Larson Creek watershed groundwater area near Stevensville;
 - Warm Springs pond groundwater area near Deer Lodge; and
 - Rocker groundwater area near Butte.

Federal Reserved Water Rights

Federal reserved water rights were created by United States Supreme Court when it ruled on the Winters Case, *Winters v. United States* (206 U.S. §564 [1908]), which involved a Fort Belknap Indian Reservation water claim. In the Winters decision, the Supreme Court held that when Congress or the President sets aside land out of the public domain for a specific federal purpose, such as an Indian reservation, national park, national forest, or a military reservation, a quantity of water is reserved that is necessary to fulfill that specific federal purpose. A federal reserved water right has a priority date as of the date the land was withdrawn and the reservation was created. The right cannot be lost through non-use. In 1952, the United States Congress passed the MacCarran Act (43 U.S.C. § 666), which subjected federal water rights to state water right law, including adjudications.

In 1979, the Legislature created the Montana Reserved Water Rights Compact Commission (Compact Commission) and assigned it the job of negotiating agreements with federal agencies and tribes holding reserved water rights. The agreement must quantify the reserved water right. The resulting agreement must be signed by the negotiating parties, the appropriate federal officials, pass through the Montana Legislature (and the U.S. Congress, in some cases), and go to the Water Court for incorporation into a final decree for the specific water basins involved.

Tribal Water Rights

The Compact Commission and the Confederated Salish and Kootenai Tribes (Tribes) are presently negotiating a compact that would quantify the Tribes' water right. The Tribes have taken the position that they have two types of water rights. The first is reserved rights tied to the purpose of their reservation, which was to provide a tribal homeland. The priority date of the reserved rights would be July 16, 1855, the date of the Hell Gate Treaty that created the reservation. The second type of water rights is pre-treaty aboriginal rights. The aboriginal rights are claimed as non-consumptive rights both on and off of the reservation tied to hunting, fishing, pasturage, and timber. In the negotiations, the Tribes are also claiming ownership of all waters that arise on or under or flow through their reservation. The Tribes also define water resources as a unitary resource for management purposes. Neither the ownership claim nor the unitary management position has been accepted by the Compact Commission.

Changes to Existing Water Rights

Montana water law has always allowed changes to be made to existing water rights and water rights to be severed from the land. Water rights were traded, sold, and moved even as Montana became a state. Historically, such changes occurred without review. When harm occurred as a result of a change, affected parties resolved their concerns in court. The administrative system created in the Montana Water Use Act included provisions to review certain modifications and changes to existing

water rights.

Since 1973, all changes to existing water rights (permits or claims) must be pre-approved by DNRC. Before a change can occur, the applicant who is proposing to change an existing water right must prove that other water rights holders would not be adversely affected. If objections are filed against a proposed change, DNRC holds a contested case hearing before deciding whether to authorize the change. DNRC's decision can be appealed to the District Court and then to the Montana Supreme Court.

Changes are statutorily defined and not all modifications to an existing right are subject to administrative review. The most common example of a water right change is moving a water right's point of diversion. Others include a change in the place of use, the purpose of use, or the place of storage. Another example may occur if irrigated farm land is subdivided and the appurtenant water right is severed and sold to a neighboring irrigator. This example involves changes in the place of use and perhaps the point of diversion or place of storage. Before authorizing these changes, DNRC must determine whether the proposed change would increase the amount of water historically consumed by the water right. Because a water right is limited by its historic use, any expansion of the amount of water diverted and uses cannot be considered a "change" to an existing water right. The expansion of use requires a new water right. To make this determination, DNRC considers such features of the water use as the amount of water historically diverted, the efficiency of the means of water delivery and of the irrigation system, the amount of water consumed by the crop, and the amount of return flow. DNRC calculates both historic water consumption and the expected consumption under the proposed change. If the proposed change would consume more water, it must be denied. The applicant has the burden of proving to DNRC that consumption would not increase and no other water rights would be adversely affected. DNRC's administrative rules for water rights changes prevent the conversion of non-consumptive rights to consumptive rights. For example, a hydropower use right cannot be changed to a municipal use right.

Instream Flows

Most water rights involve water uses that divert water from streams for consumptive uses.² However, instream, non-diversionary uses can be protected using a number of different methods, including a Murphy Right, appropriating water instream to benefit a fishery, a temporary conversion of an existing consumptive right, and a water reservation. The first method, referred to as a Murphy Right, was created with the passage of legislation sponsored by Representative James Murphy in 1969. This legislation allowed the Montana Department of Fish, Wildlife and Parks (DFWP) to appropriate water on 12 Blue Ribbon trout streams. In the Clark Fork River Basin, DFWP has Murphy Rights on the mainstem of the Blackfoot River from its mouth to the mouth of its North Fork, on the mainstem of Rock Creek from its mouth to the junction of its east and west forks, on the mainstem of the Flathead River from the South Fork to Flathead Lake and from the South Fork to the Middle Fork, from the mouth of the Middle Fork of the Flathead to Cox Creek, on the North Fork of the Flathead from the Middle Fork to the Canadian border, and on the South Fork of the Flathead from Hungry Horse Reservoir to its headwaters. The priority date for these Murphy Rights is January 1971. The amount of water claimed by DFWP for these rights depends on the time of year and largely follows the streamflow hydrograph.

² A hydropower water right is a diversionary but non-consumptive use of water.

The second method for protecting instream, non-diversionary uses is a traditional water right. In its recent Bean Lake III decision, the Montana Supreme Court ruled that fish, wildlife, and recreation are beneficial uses of water and that a water right may be obtained for them with or without a diversion.

The third method, the temporary conversion of an existing consumptive right, can occur in one of three ways. A holder of a consumptive water right may lease all or a portion of that right to DFWP to benefit a fishery, or lease the right to another party on behalf of a fishery, or convert the right to an instream use without a lease, again to benefit a fishery. DFWP leases are restricted to 20 designated streams. Most leases can last no more than 10 years, renewable once for an additional 10 years. If, however, the leased water is made available through the development of a water conservation or storage project, the lease can last 20 years. Before a lease can take effect, it must go through the change process, and the applicant must prove that other water rights holders would not be adversely affected by the change. If a lease is approved, DFWP or the other party holding the lease can protect the full amount of the leased water right to its point of diversion, but downstream from the point of diversion the lease holder can only protect the amount of water which was historically consumed.

The fourth method is a water reservation. The State of Montana, any of its political subdivisions, or the U.S. government and any of its agencies may reserve water to maintain instream flows to protect water quality as well as the fishery. To date, instream flow water reservations have been granted in the Yellowstone River basin and in the upper Missouri River basin above Fort Peck Dam. DFWP applied for an instream flow water reservation for the upper Clark Fork River basin, but the reservation application was suspended when the Legislature closed this basin.

Adjudication

All water rights with a priority date before July 1, 1973, except for some domestic groundwater and stockwater rights, are currently being adjudicated by the Montana Water Court. The adjudication involves a number of different stages, including the filing of water right claims, examination of those claims by DNRC, the issuance of a temporary preliminary decree followed by the filing of objections and the holding of hearings, the issuance of a preliminary decree followed by another round of objections and hearings, and the issuance of a final decree.

The adjudication began with the filing of claims for pre-July 1, 1973, water rights. All water right claims were to be filed by April 30, 1982. The 1993 Legislature set a new deadline, July 1, 1996, for the filing of additional water right claims. Any water right claim filed after April 30, 1982, is subject to special restrictive rules. If a water right claim was not filed by July 1, 1996, the water right was forfeited for water put to beneficial use prior to 1973.

After the water right claims are filed, the next stage in the adjudication is examination. In this stage, DNRC reviews or verifies each water right claim and indicates any perceived problems on the claim as an issue remark. For example, DNRC may indicate that a claim includes more acres than appear to be actually irrigated historically.

After examination, the Water Court combines the water right claims and DNRC's examination comments into a preliminary decree. The preliminary decree includes all of the water rights in a basin except federal and tribal reserved water rights, which may be excluded. Water rights in the decrees may specify the rate of flow, a total volume of flow, the period in which water can be used, and other

conditions. After the issuance of a temporary preliminary decree, a period for filing objections against the various water right claims is provided. This objection period is followed by a period in which counter objections may be filed. If a water user wishes to participate in the adjudication of a particular claim without formally objecting, she or he may file a notice of intent to appear. After the deadline expires for filing objections and notices of intent to appear, the Water Court begins to resolve the various objections. If an objection cannot be resolved between the parties, the Water Court will hold a hearing and rule on the validity of the contested water right.

While the adjudication is proceeding in the Water Court, the State of Montana, through the Compact Commission, is attempting to negotiate the extent of federal and tribal reserved water rights with the federal government and the tribes. At some point, either through successful negotiation or through litigation in the event that negotiation fails, the federal and tribal reserved water rights will be included in a preliminary decree. Objections can then be filed against water right claims contained in the preliminary decree. Notices of intent to appear can also be filed. After the objections and notices of intent to appear are filed, the Water Court will once again proceed to resolve the objections through hearings, if necessary. Once all of the objections to the preliminary decree are resolved, a final decree is issued and the adjudication is complete.

The following table shows the status of the adjudication each of Clark Fork River basin subdivisions.

Basin Code	Description	Status
76G	Upper Clark Fork	TPD
76F	Blackfoot	No Decree
76GJ	Flint Creek	TPD
76 E	Rock Creek	TPD
76M	Lower Clark Fork River to Paradise	TPD
76HD	Bitterroot Upper Eastside	No Decree
76HC	Bitterroot Eastside Middle	No Decree
76HA	Bitterroot River Corridor	No Decree
76HB	Lower Bitterroot River	TPD
7676 76HE	Upper Bitterroot River	TPD
76HF	Bitterroot River West Side	Preliminary Decree
76I	Middle Fork of the Flathead River	TPD
76J	South Fork of the Flathead River	TPD
76K	Swan	TPD
76L	Lower Flathead	No Decree
76LJ	Flathead Lake	No Decree

Basin Code	Description	Status
76N	Clark Fork River below the confluence with the Flathead	No Decree

Note that in the table TPD stands for Temporary Preliminary Decree. Because all of the basin's tribal and federal water rights have not been resolved, no final decrees have been issued in the Clark Fork River basin.

At this time, the Compact Commission is negotiating federal and tribal reserved water rights in the upper Clark Fork River basin. Negotiations are underway with the U.S. Forest Service (USFS) and the Confederated Salish and Kootenai Tribes. The current deadline for completion of the Compact Commission's negotiations is July 1, 2009. This deadline may or may not be extended. Due to the complication of federal and tribal reserved water rights, many years may be required before any preliminary decrees are issued in the upper Clark Fork River basin.

Enforcement of Water Rights

As stated above, one of the basic rules of the prior appropriation doctrine that governs water rights in Montana is "first in time, first in right." A senior water right user with an earlier priority date is entitled to be fully satisfied before any junior water right user can appropriate water. In times of water shortage, the senior water right holder can take all of the water. As a result, the priority date is usually the most important part of a water right.

Despite the value of an early priority date, enforcing the priority of a water right is not always easy. In Montana, enforcement is generally the responsibility of the individual water right holder. If any type of legal action has to be filed or a water commissioner has to be hired, the individual water right holders must pay the costs.

One method to enforce water rights is the appointment of a water commissioner. A water commissioner can only be appointed on decreed streams, usually those streams which were decreed by district courts in the early 1900s. Some tributaries in the Clark Fork River basin have been decreed and have water commissioners appointed every year. A water commissioner distributes water according to the priorities in the decree. A water commissioner is usually appointed by the district judge at the request of a petition signed by the water users. The cost of the water commissioner is paid by the water users *pro rata* based on the amount of water they use.

The mainstem of the Clark Fork River and many of its tributaries have not been decreed. Without decree, a water commissioner cannot be appointed. Once the Water Court has resolved all of the objections to a temporary preliminary or preliminary decree in the adjudication process, a water commissioner can be appointed to distribute water in accordance with that decree.

Enforcing a non-decreed water right is generally more difficult than a decreed water right. Both types of rights may be enforced through one of three methods. One method is to make a call on a junior water right holder. A call is made by instructing the junior user to stop taking water so that the water can be used by a senior user. Many water rights are enforced through voluntary compliance with calls made by senior users. If, however, a call is made and the junior water user

refuses to stop using water, the senior user can go to court and seek an injunction ordering the junior user to stop taking water. During the court proceeding, the junior right holder has the opportunity to prove that the call would be futile, i.e., that its enforcement would not result in water for use by the senior right holder. This can be an expensive, time-consuming process.

Another enforcement method is to seek enforcement by DNRC. Before contacting DNRC for enforcement, the senior water user must make a call on the junior users. If a junior user refuses to honor the call, the senior user should document this through photographs or other methods. The senior user can then contact DNRC, and the agency will first attempt to obtain voluntary compliance. If the junior user does not voluntarily comply within three working days, DNRC can request a court to impose a \$1,000 penalty per day for each day that the violation continues.

Disagreements regarding water use may also be resolved by a water mediator. Water mediators can be appointed at the discretion by a district court, upon the request of the governor, or by petition of at least 15 percent of the owners of the affected water rights. A water mediator has no authority to impose a settlement on the parties, but may assist the parties in agreeing how water is to be used. If no agreement is reached, the parties are free to pursue any other means of enforcing their water rights.